

SUPERIOR COURT NO. 95-1-415-9
COURT OF APPEALS NO. 47251-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent.

Vs.

BRIAN M. BASSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY
The Honorable David Edwards Judge

STATEMENT OF ADDITIONAL AUTHORITY

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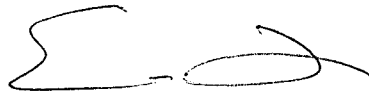
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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY AP DEPUTY

STATEMENT OF ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, the Appellant offers the following Statement of Additional Authority: The Appellant, at pages 7-18 of his opening brief, raised the issue that sentencing a juvenile offender to life in prison without the possibility of parole violates the constitutional prohibition against cruel and unusual punishment.

On May 27, 2016, the Iowa Supreme Court, in *State v. Sweet*, ____ N.W. 2d. ____, (May 27, 2016)(opinion attached), banned life without parole sentences for juvenile offenders, announcing that such sentences violated the constitutional prohibition against cruel and unusual punishment.

DATED this 31st day of May, 2016.



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Attorney for Appellant

IN THE SUPREME COURT OF IOWA

No. 14-0455

Filed May 27, 2016

STATE OF IOWA,

Appellee,

vs.

ISAIAH RICHARD SWEET,

Appellant.

Appeal from the Iowa District Court for Delaware County,
Michael J. Shubatt, Judge.

A juvenile offender convicted of first-degree murder appeals from the district court's order sentencing him to life in prison without the possibility of parole. **DISTRICT COURT SENTENCE REVERSED AND CASE REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller and Denise A. Timmins, Assistant Attorneys General, and John Bernau, County Attorney, for appellee.

APPEL, Justice.

In this case, we consider whether a juvenile who committed first-degree murder may be committed to life in prison without the possibility of parole, consistent with article I, section 17 of the Iowa Constitution. After a sentencing hearing, the district court in this case sentenced the defendant to life in prison without the possibility of parole. For the reasons expressed below, we reverse and remand the case to the district court for resentencing consistent with this opinion.

I. Factual and Procedural Background.

A. Overview of the Crime. On May 11, 2012, seventeen-year-old Isaiah Sweet shot and killed Richard and Janet Sweet. Richard and Janet had cared for Sweet since he was four years old, as his biological mother was unable to do so. Richard was Sweet's biological grandfather. Richard and Janet had been married for thirty years.

Sweet was arrested three days after the murder. After being given *Miranda* warnings, Sweet described events leading to the murders, the details of the murders themselves, and his activities in the days after the murders.

According to Sweet, Janet was dying of cancer. His grandfather, he stated, "called [him] a piece of shit every night of [his] life and every day." Sweet contended, "[Richard] constantly told [him] to just kill [himself] and fall off the earth" and "they treated [him] like shit." According to Sweet,

[he] tried so hard to help [his] grandma with everything, but [his] grandpa made everything so hard because [he was] always stressin' [Sweet] out, would scream at [him] for no reason and [he] didn't know what to do anymore, so [he] just snapped.

Sweet described events on the day of the murders. According to Sweet, he retrieved an assault rifle he had taken from his grandparents' room and loaded the rifle with hollow-point rounds because he knew that they would do the most damage, but also because he did not want his grandparents to go through any pain. He put on earmuffs to protect his own hearing. He shot his grandfather in the head from behind because he "hate[d] him [and because he] made [Sweet's] life a living hell." He then shot his grandmother twice in the head. After he shot them, he walked over to them and kissed them, told them he was sorry, and prayed for forgiveness. Sweet stated he knew right away what he did was wrong and he wanted to take it back.

After the murders, Sweet picked up a friend, and they went back to the house. He took a sawed-off shotgun, a knife, the assault rifle, a TV, some clothes, and nine dollars from his grandparents' wallets and left the house. Sweet then left the assault rifle and shotgun with some friends and drove to Cedar Rapids where he "party hopped to like eight different apartments" and engaged in drug transactions. Sweet told police that he told a number of persons about the murders, including his former girlfriend.

The next day, May 12, Sweet attended a birthday party for a friend's sister and then drove to Iowa City to "some big ass party." After the party, the police arrested Sweet for driving with a suspended license, and the car was impounded. At the police station, Sweet told authorities his grandparents were at the Mayo Clinic. Police allowed Sweet to call his counselor, and Sweet was released to the counselor the following day. Sweet thereafter continued his drug usage and spent the evening in a tent in the woods. The next day, May 14, authorities arrested him after spotting him at a Hardee's restaurant.

B. Initial Legal Proceedings. The State charged Sweet with two counts of first-degree murder. Sweet pled not guilty, and his case came to trial in October 2013. At the conclusion of the State's case, Sweet reached a plea agreement with the State. Sweet agreed to plead guilty to two counts of first-degree murder. The State agreed to recommend that the sentences run concurrently. The State and Sweet agreed a sentencing hearing would occur based on Sweet's "age and the state of [the] law." Upon being informed of the plea agreement, the court engaged Sweet in a colloquy in which Sweet stated that the witnesses would truthfully testify to facts stated in the minutes of testimony. The district court accepted the guilty plea and entered an order for a presentence investigation (PSI) report to be prepared. In the order, the court noted that the basis for the request was "the Iowa Supreme Court's decisions in *Null*, *Pearson*, and *Ragland*."

C. PSI Report. Pursuant to the court's order, a PSI report was prepared by the department of correctional services. The PSI report outlined the facts surrounding the crimes. The juvenile arrest history in the PSI report included a curfew violation, possession of illegal drugs, possession of drug paraphernalia, possession of alcohol under eighteen, minor using tobacco, assault with intent to commit sexual abuse, and operating a vehicle without consent.

With respect to his education, the PSI report indicated Sweet had dropped out of high school in his junior year with a grade point average of 1.061. The PSI report noted Sweet claimed he was "really intelligent" but did not apply himself and was too busy with friends to worry about grades. According to Sweet, he passed three of the GED pretests. He planned to move to Pennsylvania when he turned eighteen and live with

his mother so he could attend Penn State University. The PSI report indicated he had been suspended from school on numerous occasions.

The PSI report included an extended discussion of Sweet's family dynamics. Sweet's parents, Stacy Sweet and Christopher Galli, never married but were together for about five years. Stacy reported both she and Christopher had histories of substance abuse, with Stacy admitting to cocaine addiction. After Sweet was born, Stacy gave birth to another child by Ronald Kempinski. Kempinski at one point left Stacy and took the two children, thereafter leaving Sweet with Richard; however Stacy stated she took Sweet back at some point.

Events leading up to the placement of Sweet with Richard and Janet are unclear. Sweet reported his parents' rights were terminated because he was raped by a neighbor when he was about four. Stacy maintained her parental rights were never terminated, but she could not pursue custody because she was involved in a relationship in which there was domestic violence. Stacy reported she had been physically and verbally abused by Richard and Janet when she was a child and wanted her son placed in foster care instead of with her parents. What is clear is that Sweet came to live with Richard and Janet when he was approximately four.

The PSI report further indicated that Richard and Janet moved to Iowa when Sweet was seven to attend to Richard's mother who was in poor health. Richard and Janet did not allow Sweet to talk to his mother until he became a teenager, when Stacy gave him a cell phone. When Stacy moved back to Iowa in 2010, the family fought constantly. Sweet wanted to live with her but Richard and Janet would not allow it. Stacy moved back to Pennsylvania in 2012.

The family dynamics between Richard, Janet, and Sweet were tumultuous, with frequent arguments and screaming. Sweet reported he was diagnosed with Attention Deficit Disorder (ADD) at the age of four. Counseling was sought from Families, Inc. in early 2011, which was unsuccessful. Sweet reported the family therapist recommended inpatient committal for drug abuse, which occurred, followed by outpatient support from the ABBE Center in Manchester. At the ABBE Center, Sweet was diagnosed with Attention Deficit Hyperactivity Disorder and Conduct Disorder. The therapist characterized Sweet's insight and judgment as "limited" and noted he "may be experiencing symptoms of mania and [the] diagnosis may be Bipolar Disorder, as evidenced by [the] impulsive behaviors displayed and [the] behavior with risk for consequences."

Sweet was first referred to Juvenile Court Services (JCS) in March 2011 and again in December 2011. His cooperation with JCS was inconsistent. After being accused of a sexual assault in April 2012, he again met with JCS. On their way home from the meeting, Sweet jumped from his grandparents' moving vehicle.

Regarding his emotional and personal health, the PSI report indicated Sweet reported he had attempted suicide several times in the past, with the most recent attempt being in the tent just prior to his arrest for the murder of his grandparents.

The PSI report noted that Richard had legal difficulties with Stacy and his other daughter, Alysia, arising from the distribution of assets from his mother's estate. The dispute led to Richard's arrest on a theft charge and the loss of his job as a result of the arrest. Stacy reported Richard took his anger at his two daughters out on Sweet and was abusive towards Sweet.

The PSI report also provided information regarding drug abuse in the Sweet household. Richard's daughter told therapists that Richard was an alcoholic, while Sweet indicated he sold Adderall to Richard. Beginning at age fourteen, Sweet began using marijuana. At the time of his arrest, he was using marijuana daily. He also abused "all kinds of pain killers and prescription drugs" but denied use of methamphetamine or needle-injected substances. His grandparents had Sweet committed because of suspected drug abuse in July 2011. Sweet also began using alcohol at age fifteen and engaged in binge drinking from time to time. Sweet, however, denied having an alcohol or drug abuse problem.

Lastly, the PSI report contained information about risk-taking behavior. Sweet told a psychiatrist that he enjoyed reckless activities with friends, such as doing a back flip off a bridge into shallow water or playing games that involved dropping burning cigarettes between two friends' arms. Sweet also recalled drinking to excess and having a friend burn him fifteen times with cigarettes.

D. Sentencing Hearing. A sentencing hearing occurred on February 26, 2014. The court was provided with the PSI report, which was admitted into evidence without objection and without correction or elaboration by either party. The court also admitted Sweet's juvenile records, a video recording of an interview with Sweet following the murders, a transcript of that interview, a transcript of the State's case in chief in the murder trial prior to the plea agreement, and photographs of the crime scene and the weapon used to commit the crime.

The court heard victim impact statements from Matthew Camlin, the son of Janet and stepson of Richard; Amanda Sichra, Jane and Richard's granddaughter; and Angie Camlin, daughter of Janet and stepdaughter of Richard.

The State offered the testimony of John McEnany, a juvenile court officer. McEnany generally described information gleaned from approximately ten meetings with Sweet that commenced in December 2011 after Sweet was charged with possession of drug paraphernalia. McEnany recounted a history of Sweet's unstable family life, previous counseling services that Richard and Janet had sought for Sweet's behavioral and mental health issues, and his lengthy juvenile record.

At the close of the State's evidence, the defense offered and the court heard a victim impact statement from Stacy, Sweet's mother, but also the daughter of one of the deceased, Richard. Like the victims providing impact statements in the State's case, Stacy's testimony ranged beyond the impact of the crime on her. Although Stacy testified broadly about the nature of the crime and the kind of punishment she desired, the court emphasized that it would consider the victim impact statement only to the extent it related to the impact of the crime on her and nothing else.

Sweet then offered the testimony of Dr. Stephen Hart, a highly qualified expert witness in the field of clinical psychology with a special focus on the assessment of violence, risk, and psychopathic personality disorder. Dr. Hart reviewed extensive documentation regarding Sweet and also interviewed Sweet prior to preparing his report.

Dr. Hart generally summarized advancements in the past twenty to thirty years regarding the understanding of the development of the adolescent brain. He noted it is now understood that up until the age of about twenty-five there is a period of rapid change or development in the adolescent brain. Regarding the maturation of the adolescent brain, he noted that when individuals are young they are impulsive, and as people get older, "[they] learn . . . the skills to inhibit behavior."

With respect to Sweet, Dr. Hart concluded he had severe developmental problems, serious problems related to mental health, serious problems with personal relationships, and serious problems with educational adjustment. He asserted Sweet's decision-making was destabilized by disturbed attention and also by impulsivity. Dr. Hart concluded Sweet was psychologically and socially immature (in terms of self-concept, empathy, and insight) and impetuous at least in part due to early onset, severe ADD. He testified that while Sweet was chronologically seventeen, his psychological or social maturation was somewhere around twelve, thirteen, or fourteen. Dr. Hart noted that although Sweet's actions appeared highly planned or premeditated, they were a "pretty bad plan" and not the "well executed plan of a common criminal."

Dr. Hart concluded by noting Sweet's prospects for rehabilitation were "mixed." According to Dr. Hart, there was some chance Sweet would experience a spontaneous partial or even full remission of his symptoms. However, he testified it was simply not possible to determine whether Sweet would develop a full-blown psychopathic personality disorder as an adult, and even if he did, psychologists could not say whether it would be untreatable. According to Dr. Hart, the earliest a determination could be made regarding Sweet's potential for rehabilitation was age thirty. According to Dr. Hart, "[W]e won't even be in a position to make a decision [about whether Sweet will get better or not] for many years because of his youth."

Sweet was last to testify. He expressed remorse and discussed his tumultuous relationship with his grandparents, which created "trust issues." Sweet asked the court to consider his youth and his desire to be rehabilitated when imposing its sentence.

The district court rendered its sentencing decision on March 11. After listing the *Miller/Ragland* factors, the district court sentenced Sweet to life in prison without the possibility of parole. The district court noted that Sweet was seventeen years and three months old at the time of the murder. While his maturity was debatable, the district court stressed that the crimes were premeditated. The district court felt that Dr. Hart's characterization of Sweet's possibility of rehabilitation as mixed was overly optimistic. Further, the district court found Sweet's case was the rare case in which a sentence of life without the possibility of parole was warranted, as the murders were horrific and showed utter lack of humanity. The district court concluded that Sweet was currently, and will continue to be, a threat to society and that the interests of justice and community safety outweighed mitigating factors.

II. Standard of Review.

Our standard of review when a defendant attacks his or her sentence on constitutional grounds is de novo. *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015); *State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014); *State v. Ragland*, 836 N.W.2d 107, 113 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88, 94 (Iowa 2013); *State v. Null*, 836 N.W.2d 41, 48 (Iowa 2013); *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

III. Discussion.

A. Positions of the Parties.

1. *Sweet*. Sweet raises two related but distinct arguments in this appeal. First, Sweet argues the district court erred in holding that this is a rare or uncommon case for which life imprisonment without parole may be imposed on a juvenile. Citing the *Roper-Graham-Miller* trilogy, the leading United States Supreme Court cases under the Eighth Amendment, Sweet asserts his age, his immaturity and impetuosity,

his family and home environment, and his prospects for rehabilitation make a life-without-parole sentence constitutionally impermissible.¹ See *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Sweet does not expressly state whether he is proceeding under the cruel and unusual punishment provision of the United States Constitution or the Iowa Constitution. Along with citing the Supreme Court cases, Sweet also cites recent Iowa cases decided under the cruel and unusual punishment provision of the Iowa Constitution, article I, section 17. See *Lyle*, 854 N.W.2d at 378; *Ragland*, 836 N.W.2d at 107; *Null*, 836 N.W.2d at 41. When a party does not specifically indicate whether a claim is based under the Iowa or Federal Constitution, both the state and federal claims are preserved. See *State v. Harrington*, 805 N.W.2d 391, 393 n.3 (Iowa 2011); *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). When a different standard is not presented under the Iowa Constitution, however, we apply the federal framework, reserving the right to apply that framework in a fashion different from federal precedents. See *State v. Breuer*, 808 N.W.2d 195, 200 (Iowa 2012); *State v. Pals*, 805 N.W.2d 767, 771–72 (Iowa 2011).

Next, Sweet contends life without the possibility of parole should be categorically banned for juvenile offenders under the Iowa Constitution. He argues the rationale of *Graham*, namely, that it is

¹Sweet suggests the standard of review on his *Miller*-type claim is abuse of discretion. This is incorrect. Review of *Miller*-type constitutional claims is de novo. See, e.g., *Seats*, 865 N.W.2d at 553 (explaining various standards for challenges to sentences, including de novo review for constitutional claims).

impossible to determine the future behavior of juvenile offenders, supports a categorical ban on life without the possibility of parole in homicide cases. He notes the United States is the only country in the world that imposes life-without-the-possibility-of-parole sentences on juveniles, see Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet*, 35 N.Y.U. Rev. L. & Soc. Change 408, 411 (2011), and the abandonment of such sentences has been supported by professional organizations such as the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers. See Brief for Am. Bar Ass'n as Amicus Curiae Supporting Petitioners, *Miller*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (Nos. 10-9647, 10-9646), 2012 WL 166269 [hereinafter ABA Brief]; Brief for Am. Psychological Ass'n et al. as Amici Curiae in Supporting Petitioners, *Miller*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (Nos. 10-9646, 10-9647), 2012 WL 174239 [hereinafter APA Brief].

The United States Supreme Court left this issue open in *Miller*. Although Sweet mentions the Eighth Amendment to the United States Constitution in passing, he does not expressly ground his claim on the Eighth Amendment in his brief. Sweet explicitly brings his claim under the Iowa Constitution. Because we decide this case on other grounds, we need not consider whether Sweet waived any categorical challenge under the United States Constitution.

2. *The State.* The State asserts the district court did not abuse its discretion, as it appropriately analyzed the *Miller* factors. The State contends Sweet murdered his grandparents in cold blood and that he is an “uncommon” juvenile offender who warrants a sentence of life without the possibility of parole. The State notes the murders were premeditated

and were heinous in nature. According to the State, nothing in Sweet's background, including his chronological age, his family and home environment, or the incompetencies of youth, support a lesser sentence than life without the possibility of parole. With respect to rehabilitation, the State argues there was no evidence the defendant can ever be rehabilitated. The State further argues that the Iowa and the United States Constitutions permit the sentence of life without the possibility of parole for some juvenile murderers.

The State further rejects the notion that this court should adopt a categorical approach to life without the possibility of parole for juvenile offenders. According to the State, our cases since *Miller—Null*, *Ragland*, *Pearson*, and *Lyle*—have all embraced the notion of individualized hearings to determine whether a life-in-prison sentence meets constitutional muster. The State emphasizes that in *Miller* the United States Supreme Court did not embrace a categorical approach banning life-in-prison sentences for juveniles. The State rejects the reliance on the fact that the United States is an international outlier, asserting that American law must be based on American values.

B. United States Supreme Court Precedents.

1. *Introduction.* We begin our consideration of the issues with a review of United States Supreme Court precedents under the Cruel and Unusual Punishment Clause of the Eighth Amendment. In *Weems v. United States*, the Supreme Court held that a twelve-year jail term in irons at hard labor for the crime of falsifying records was excessive, emphasizing “that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” 217 U.S. 349, 367, 30 S. Ct. 544, 549, 54 L. Ed. 793, 798 (1910). Later, in *Trop v. Dulles*, the Supreme Court emphasized that the Eighth Amendment

“must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958). The teachings of *Weems* and *Trop*, namely that the Eighth Amendment embraces a proportionality principle that draws meaning from “the evolving standards of decency,” have been repeatedly cited in more recent cruel and unusual punishment cases of the United States Supreme Court. *See, e.g., Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 742, 193 L. Ed. 2d 599, 629 (2016) (Scalia, J., dissenting); *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1992, 188 L. Ed. 2d 1007, 1016 (2014); *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463, 183 L. Ed. 2d at 417; *Graham*, 560 U.S. at 58–59, 130 S. Ct. at 2021, 176 L. Ed. 2d at 835; *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525, 538 (2008); *Roper*, 543 U.S. at 560–61, 125 S. Ct. at 1190, 161 L. Ed. 2d at 16; *Atkins v. Virginia*, 536 U.S. 304, 311–12, 122 S. Ct. 2242, 2247, 153 L. Ed. 2d 335, 344 (2002).

2. *Developing caselaw regarding the death penalty and vulnerable classes.* Beginning in the 1970s, the Supreme Court began to consider whether the Cruel and Unusual Punishment Clause should be interpreted to categorically bar the death penalty generally or, in the alternative, with respect to certain vulnerable classes of people. In a series of cases, the Supreme Court considered the merits of broad categorical prohibitions as compared to more precise case-by-case adjudications where, at least in theory, the law’s most severe punishment was reserved for the most culpable or most deserving. While this case deals with life in prison without parole rather than the death penalty, the death-penalty cases provide a backdrop for the Supreme Court’s later consideration of the implications of the Eighth Amendment

on the sentence of life in prison without parole for juvenile offenders. In particular, the death-penalty cases show the tension between categorical rules, which prohibit imposition of the death penalty for certain classes or cases, and a more finely tuned case-by-case approach, which seeks to identify the most culpable of offenders who might be deserving of severe punishment.

The Supreme Court considered the constitutionality of the death penalty in murder and rape cases in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam) (plurality opinion). In *Furman*, a 5–4 majority of a highly fractured Supreme Court held that the imposition of the death penalty in the cases before the court would constitute cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 239–40, 92 S. Ct. at 2727, 33 L. Ed. 2d at 350.

The crucial opinion in *Furman* was provided by Justice Stewart, who declined to reach the question of whether the death penalty was categorically barred, but found the arbitrary and capricious nature of the application of the death penalty made it unconstitutional as applied in the cases before the court. *Id.* at 306, 309–10, 92 S. Ct. at 2760, 2762–63, 33 L. Ed. 2d at 388, 389–90. According to Justice Stewart, the rarity of the death penalty in cases where it might theoretically be imposed made the sentences under consideration “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Id.* at 309, 92 S. Ct. at 2762, 33 L. Ed. 2d at 389–90.

All in all, two justices in *Furman* found the death penalty categorically unconstitutional for all purposes,² three justices found the

²*Furman*, 408 U.S. at 305–06, 92 S. Ct. at 2760, 33 L. Ed. 2d at 387–88 (Brennan, J., concurring); *id.* at 358–59, 92 S. Ct. at 2787, 33 L. Ed. 2d at 417–18 (Marshall, J., concurring).

statutes before the court unconstitutional as applied but declined to reach the categorical question,³ and four dissenting justices found the death penalty not subject to categorical challenge.⁴ While the categorical issue thus remained open in *Furman*, the Supreme Court majority was clearly concerned about the arbitrary nature of the imposition of the death penalty and the need to focus its application on only the most deserving offenders.

The Supreme Court next considered whether the death penalty should be categorically barred under the Cruel and Unusual Punishment Clause in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). In *Gregg*, the statutory provision authorizing the death penalty bifurcated the question of guilt from penalty; the jury was instructed regarding aggravating and mitigating factors; the prosecution had to prove an aggravating factor beyond a reasonable doubt to support the death penalty; and the district court was required to complete an extensive report on the trial proceedings. *Id.* at 163–66, 96 S. Ct. at 2920–22, 49 L. Ed. 2d at 869–70. In addition, the statute provided detailed procedures regarding appeals of death sentences. *Id.* at 166–68, 96 S. Ct. at 2922, 49 L. Ed. 2d at 870–71. The statute provided that the Georgia Supreme Court would automatically review any death sentence to determine if it was imposed under the

³*Furman*, 408 U.S. at 257, 92 S. Ct. at 2735–36, 33 L. Ed. 2d at 359–60 (Douglas, J., concurring); *id.* at 309–10, 92 S. Ct. at 2762–63, 33 L. Ed. 2d at 390 (Stewart, J., concurring); *id.* at 312–13, 92 S. Ct. at 2764, 33 L. Ed. 2d at 392 (White, J., concurring).

⁴*Furman*, 408 U.S. at 375, 92 S. Ct. at 2796–97, 33 L. Ed. 2d at 428 (Burger, C.J., dissenting); *id.* at 414, 92 S. Ct. at 2816, 33 L. Ed. 2d at 450–51 (Blackmun, J., dissenting); *id.* at 461–65, 92 S. Ct. at 2840–42, 33 L. Ed. 2d at 478–80 (Powell, J., dissenting); *id.* at 468, 92 S. Ct. at 2843, 33 L. Ed. 2d at 486 (Rehnquist, J., dissenting).

influence of passion and prejudice, to determine if the evidence supported statutory aggravating circumstances, and to determine whether the sentence was disproportionate compared to sentences imposed in similar cases. *Id.* at 166–67, 96 S. Ct. at 2922, 49 L. Ed. 2d at 871.

In *Gregg*, Justice Stewart joined the four dissenters in *Furman* to uphold the Georgia death-penalty statute and the resulting convictions. *Id.* at 168–69, 96 S. Ct. at 2922–23, 49 L. Ed. 2d at 872. In an opinion joined by Justices Powell and Stevens, Justice Stewart characterized the *Furman* decision as holding that the death penalty could not be imposed “under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.” *Id.* at 188, 96 S. Ct. at 2932, 49 L. Ed. 2d at 883. As in *Furman*, the *Gregg* Supreme Court plurality was plainly concerned with ensuring that the death penalty was focused only on the most deserving offenders. *Id.* at 183, 96 S. Ct. at 2930, 49 L. Ed. 2d at 880. Justice Stewart found that the detailed procedures in the Georgia statute rendered the death penalty constitutional in the case before the court. *Id.* at 207, 96 S. Ct. at 2941, 49 L. Ed. 2d at 893.

The same day the Supreme Court decided *Gregg*, it also handed down its decision in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion). In *Woodson*, the North Carolina legislature responded to concerns in *Furman* about the arbitrary and capricious nature of the application of the death penalty by enacting a statute in which the death penalty was mandatory for the crime of first-degree murder. *Id.* at 286–87, 96 S. Ct. at 2982–83, 49 L. Ed. 2d at 950–51. This amounted to categorization in reverse: instead of categorically barring the death penalty for those found guilty of first-degree murder,

the statute categorically *imposed* the death penalty on all found guilty of the crime. *Id.*

In a plurality opinion by Justice Stewart, the Supreme Court found the reverse categorical North Carolina statute unconstitutional. *Id.* at 305, 96 S. Ct. at 2991–92, 49 L. Ed. 2d at 961–62. The *Woodson* plurality found the statute defective for three reasons. First, in practice the United States’ evolving standards of decency reject mandatory imposition of the death penalty for all persons convicted of a particular offense as “unduly harsh and unworkably rigid.” *Id.* at 292–93, 96 S. Ct. at 2985–86, 49 L. Ed. 2d at 953–54. Second, the *Woodson* plurality noted that juries had no standards to guide their exercise of power and that juries might be willing to act lawlessly to avoid the imposition of a death sentence. *Id.* at 302–03, 96 S. Ct. at 2990–91, 49 L. Ed. 2d at 959–60. Finally, the plurality emphasized that the statute failed to allow “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” *Id.* at 303, 96 S. Ct. at 2991, 49 L. Ed. 2d at 960–61.

Read together, the opinions in *Gregg* and *Woodson* stand for the proposition that a statutory death penalty, if appropriately structured, could survive a categorical constitutional challenge under the Eighth Amendment. The emphasis in *Woodson* on particularized, case-by-case exploration of mitigation gave rise, however, to an important development in the law, namely, the development in capital cases of a body of law related to the proper presentation of a mitigation defense. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604–05, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973, 989–90 (1978) (plurality opinion).

It has long been recognized that those offenders facing severe penalties are often poorly represented in their underlying criminal trials.

See Powell v. Alabama, 287 U.S. 45, 52, 53 S. Ct. 55, 58, 77 L. Ed. 158, 162 (1932). The American Bar Association (ABA) took the lead in developing mitigation guidelines for the defense of criminal defendants facing the death penalty.

As early as 1970, the ABA developed its generally applicable *ABA Standards Relating to the Prosecution Function and the Defense Function*. In response to the evolving death-penalty jurisprudence, the ABA developed more specific guidelines relevant to representation in death-penalty cases in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003) [hereinafter *ABA Guidelines*], and *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008) [hereinafter *Supplementary Guidelines*].

The later *Supplementary Guidelines* require the assembly of a mitigation specialist to investigate potential mitigation defenses and present them to the sentencer. *Supp. Guidelines*, Guideline 4.1, 36 Hofstra L. Rev. at 680–81. The guidelines and supplement require, among other things, the establishment of a relationship of trust between the defense team and the accused; thorough exploration of a defendant's family and social history, including extensive interviews; the participation in the defense of a trained mitigation expert experienced in the psychological and social sciences; and the hiring of other experts to assist the defense. *ABA Guidelines*, Guideline 10.5, 31 Hofstra L. Rev. at 1005–06; *Supp. Guidelines*, Guideline 10.11, 36 Hofstra L. Rev. at 689–92. The scope and manner of investigation and the advocacy contemplated by the guidelines and supplement are at great variance from the routine sentencing practices often employed in the courts. *See*

ABA Guidelines, 31 Hofstra L. Rev. at 928 (describing the need for the guidelines due to problems with the quality of defense being “profound and pervasive” in death-penalty cases). Under the guidelines and supplement, the mass-produced, routine Model-A defense of offenders facing the death penalty was abandoned in favor of a new, highly intense individualized process that harnessed recent developments in behavioral and psychological sciences. See ABA Guidelines, Guideline 10.5, 31 Hofstra L. Rev. at 1005–06; Supp. Guidelines, Guideline 10.11, 36 Hofstra L. Rev. at 689–92.

Although the Supreme Court has never held that the ABA Guidelines or Supplementary Guidelines are mandatory, they have nonetheless served as a guide for determining whether counsel has been ineffective in death-penalty cases. Even though the federal standard of ineffective assistance established in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692–93 (1984), has often been regarded as a difficult standard to meet, the Supreme Court, citing ABA Standards and Guidelines, has found ineffective assistance in a number of death-penalty cases. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387–90, 125 S. Ct. 2456, 2465–67, 162 L. Ed. 2d 360, 375–77 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2536–37, 156 L. Ed. 2d 471, 486 (2003); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1514–15, 146 L. Ed. 2d 389, 420 (2000) (plurality opinion).

The upshot of the Supreme Court’s *Gregg-Woodson* line of cases is that in states where the death penalty is authorized with an appropriately detailed statute, a highly specialized “death penalty bar” has arisen to ensure that death-penalty defendants obtain the kind of representation necessary to prevent arbitrary and capricious application

of the sanction and allow the death penalty to be imposed only on the most culpable offenders.

While the *Woodson* approach has generated a new and substantial body of law regarding the process of case-by-case determinations in death-penalty cases, the notion that the death penalty might be categorically barred in certain types of cases remained viable. In *Coker v. Georgia*, the Supreme Court considered the constitutionality of the death penalty in connection with the rape of an adult woman. 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality opinion). The Supreme Court, by another 5–4 vote, took a categorical approach, finding that the death penalty could not constitutionally be imposed for the crime of rape. *Id.* at 600, 97 S. Ct. at 2870, 53 L. Ed. 2d at 994.

In a plurality opinion, Justice White surveyed the attitudes of state legislatures and sentencing juries and concluded that they weigh against the death penalty for the crime of rape. *Id.* at 593–97, 97 S. Ct. at 2866–68, 53 L. Ed. 2d at 990–92. Justice White, however, stated that the attitude of state legislatures and sentencing juries did not wholly resolve the controversy as the Constitution contemplated that the Court brings its own independent judgment to bear on the question. *Id.* at 597, 97 S. Ct. at 2868, 53 L. Ed. 2d at 992. In applying independent judgment, Justice White concluded that the death penalty for rape was categorically unconstitutional. *Id.* at 600, 97 S. Ct. at 2870, 53 L. Ed. 2d at 994. In reaching this conclusion, he noted that rape was not the equivalent of murder and yet under Georgia law, a rapist could face the death penalty while a person who deliberately murdered a victim without aggravating circumstances would escape a death sentence. *Id.* at 599–600, 97 S. Ct. at 2869–70, 53 L. Ed. 2d at 993–94.

The Supreme Court came to a similar categorical conclusion in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (plurality opinion). In *Enmund*, the Supreme Court held that the death penalty could not constitutionally be applied to persons convicted on an aiding and abetting theory when the defendant did not kill or intend to kill the victim. *Id.* at 801, 102 S. Ct. at 3378, 73 L. Ed. 2d at 1154. As in the plurality opinion in *Coker*, the plurality canvassed objective factors, including legislative judgments and international opinion, but also noted that the Court was required to apply its independent judgment in making the ultimate determination. *Id.* at 797, 102 S. Ct. at 3376, 73 L. Ed. 2d at 1151. In rejecting the death penalty categorically when the defendant did not kill or intend to kill the victim, the *Enmunds* plurality emphasized the role of moral guilt as “critical to ‘the degree of . . . criminal culpability.’” *Id.* at 800, 102 S. Ct. at 3378, 73 L. Ed. 2d at 1153 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 1889, 44 L. Ed. 2d 508, 519 (1975)).

In sum, the Supreme Court in *Furman* arguably came close to abolishing the death penalty categorically in all circumstances, but then retreated into a bifurcated approach as seen in *Gregg*, *Woodson*, *Coker*, and *Enmund*. In some cases involving certain offenses, the Supreme Court held that the death penalty was categorically barred as “excessive” for the crime and therefore contrary to the Eighth Amendment. *Enmund*, 458 U.S. at 801, 102 S. Ct. at 3378, 73 L. Ed. 2d at 1154; *Coker*, 433 U.S. at 598, 97 S. Ct. at 2869, 53 L. Ed. 2d at 993. On the other hand, for the heinous crime of murder, the Supreme Court held that death penalty is not barred in all circumstances, but instead must be applied pursuant to specific standards and procedures designed to ensure that the death penalty is not administered in an arbitrary or capricious

manner and to ensure that the harsh penalty is reserved for the most culpable offenders. *Woodson*, 428 U.S. at 303, 96 S. Ct. at 2990–91, 49 L. Ed. 2d at 960; *Gregg*, 428 U.S. at 188, 206–07, 96 S. Ct. at 2932, 2940–41, 49 L. Ed. 2d at 883, 893. The possibility of individualized consideration of moral culpability gave rise to the development by the American Bar Association of detailed and intensive standards for the representation of persons subject to the death penalty and a new era of representation in death-penalty cases.

3. *Post-Furman Supreme Court caselaw regarding death penalty and life in prison for juveniles and vulnerable classes.* We now turn our attention to post-*Furman* cases of the United States Supreme Court dealing with the constitutionality under the Eighth Amendment of the death penalty for juvenile offenders or vulnerable classes. The focus here is not on the nature of the crime, as in *Coker* or *Enmund*, but on the character or qualities of the defendant that arguably lessen the culpability of the defendant and make that defendant less deserving of harsh criminal penalties.

We begin our discussion with *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). In *Eddings*, the Supreme Court considered whether a sixteen-year-old juvenile convicted of murder could receive the death penalty. *Id.* at 105, 102 S. Ct. at 872, 71 L. Ed. 2d at 5. In *Eddings*, the trial court recognized that although Eddings had “a personality disorder,” he still knew the difference between right and wrong and therefore his personality disorder could not be considered in determining his criminal responsibility. *Id.* at 109–10, 102 S. Ct. at 874, 71 L. Ed. 2d at 7–8. The trial court further held that while his family history was “useful in explaining” his offense, it did not offer an excuse. *Id.* at 110, 102 S. Ct. at 874, 71 L. Ed. 2d at 8.

In a five-member-majority opinion by Justice Powell, the Supreme Court concluded that the death penalty was not constitutionally applied to the defendant in this case. *Id.* at 117, 102 S. Ct. at 878, 71 L. Ed. 2d at 12. The Court rejected the trial court's determination that as a matter of law the mitigating factors of a difficult family history and emotional disturbance should not be considered by the jury. *Id.* at 112-15, 102 S. Ct. at 876-77, 71 L. Ed. 2d at 9-11. Further, the *Eddings* Court observed that while "[e]ven the normal 16-year-old customarily lacks the maturity of an adult," the evidence suggested that Eddings' mental and emotional development were "at a level several years below his chronological age." *Id.* at 116, 102 S. Ct. at 877, 71 L. Ed. 2d at 12. The *Eddings* Court noted that not only was the minority of the offender "a mitigating factor of great weight," the mental and emotional development of a youthful defendant must be considered as well in sentencing. *Id.* at 108, 116, 102 S. Ct. at 873, 877, 71 L. Ed. 2d at 7, 12. Consistent with *Furman*, *Gregg*, and *Woodson*, the Court emphasized that the state statutes must ensure that "the sentencing authority is given adequate information and guidance." *Id.* at 111, 102 S. Ct. at 875, 71 L. Ed. 2d at 8-9 (quoting *Gregg*, 428 U.S. at 195, 96 S. Ct. at 2935, 49 L. Ed. 2d at 887).

The Supreme Court next considered the death penalty for a fifteen-year-old offender in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion). The defendant urged the Court to categorically conclude that the death penalty could not be applied against defendants under the age of sixteen. *Id.* at 818-19, 108 S. Ct. at 2690, 101 L. Ed. 2d at 708.

In an opinion by Justice Stevens, a plurality of the Court began by emphasizing that in many legal contexts, children are treated differently

from adults. *Id.* at 823–25, 108 S. Ct. at 2692–93, 101 L. Ed. 2d at 711–12. While the age of majority varied among the states, no state set the age lower than sixteen. *Id.* at 824, 108 S. Ct. at 2963, 101 L. Ed. 2d at 711. The plurality noted that most states did not expressly establish an age for the death penalty, but merely provided that certain juveniles could be waived into adult court. *Id.* at 826–27, 108 S. Ct. at 2694–95, 101 L. Ed. 2d at 712–14. These statutes, according to the plurality, did not focus on the question of what chronological age the line should be drawn. *Id.* at 827–29, 108 S. Ct. at 2695, 101 L. Ed. 2d at 713–14. The plurality observed that of all the persons sentenced to death, only five were less than sixteen years old at the time of the offense. *Id.* at 832–33, 108 S. Ct. at 2697, 101 L. Ed. 2d at 717. Further, the plurality noted that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. *Id.* at 835, 108 S. Ct. at 2698, 101 L. Ed. 2d at 718. Finally, the plurality found that retribution did not justify the execution of a less culpable fifteen-year-old offender and that deterrence did not justify the death penalty as teenage minds were not likely to engage in the kind of cost-benefit analysis that attaches any weight to the remote possibility of execution. *Id.* at 836–37, 108 S. Ct. at 2699–700, 101 L. Ed. 2d at 719–20. While the plurality categorically would invalidate the death penalty for all fifteen-year-old offenders, it declined to consider the invitation of the offender and various amici curiae to draw the line at eighteen. *Id.* at 838, 108 S. Ct. at 2700, 101 L. Ed. 2d at 720.

The deciding *Thompson* opinion, however, was written by Justice O'Connor who concurred in the judgment of the Court. *Id.* at 848, 108 S. Ct. at 2706, 101 L. Ed. 2d at 728 (O'Connor, J., concurring in judgment). While concurring in the judgment, Justice O'Connor did not

embrace the plurality's discussion of objective factors or proportionality. *Id.* at 848–49, 108 S. Ct. at 2706, 101 L. Ed. 2d at 728–29. She concurred in result only because the Oklahoma legislature did not directly consider whether a fifteen year old should be eligible for the death penalty. *Id.* at 857, 108 S. Ct. at 2710–11, 101 L. Ed. 2d at 734. Justice O'Connor declined to embrace a broader rule that the death penalty for fifteen year olds was always unconstitutional, but only that the Oklahoma statute as applied to fifteen year olds was invalid. *Id.* at 857–58, 108 S. Ct. at 2711, 101 L. Ed. 2d at 734.

In *Penry v. Lynaugh*, the Supreme Court considered the constitutionality of the death penalty when the accused was intellectually disabled. 492 U.S. 302, 307, 109 S. Ct. 2934, 2941, 106 L. Ed. 2d 256, 271 (1989) (plurality opinion), *abrogated by Atkins*, 536 U.S. at 307, 321, 122 S. Ct. at 2244, 2252, 153 L. Ed. 2d at 341, 350. In *Penry*, the jury did not receive an instruction that it could consider and give effect to the mental characteristics of the offender as a mitigating circumstance. *Id.* at 310–11, 109 S. Ct. at 2942–43, 106 L. Ed. 2d at 273. The jury convicted Penry of murder, and he was sentenced to death. *Id.* at 310–11, 109 S. Ct. at 2942–43, 106 L. Ed. 2d at 272–73.

Justice O'Connor wrote the main opinion for the *Penry* Court. Writing for a five-member majority, she wrote that the Texas sentencing procedure did not adequately afford the defendant with an individualized hearing. *Id.* at 328, 109 S. Ct. at 2952, 106 L. Ed. 2d at 284. Because punishment “should be directly related to the personal culpability of the defendant,” the jury must be allowed to consider and give effect to the defendant's mental status. *Id.* at 327–28, 109 S. Ct. at 2951, 106 L. Ed. 2d at 284. As a result, Justice O'Connor concluded for a majority

of the Court that Penry's sentence must be reversed. *Id.* at 328, 109 S. Ct. at 2952, 106 L. Ed. 2d at 284.

Justice O'Connor further concluded that a categorical bar could not be adopted "today." *Id.* at 340, 109 S. Ct. at 2958, 106 L. Ed. 2d at 292. She emphasized that Penry was found competent to stand trial and knew the difference between right and wrong. *Id.* at 333, 109 S. Ct. at 2954-55, 106 L. Ed. 2d at 288. Further, Justice O'Connor, relying largely on the fact that only two legislatures had barred the death penalty for intellectually disabled offenders, found there was no objective evidence of an emerging national consensus in support of a categorical ban. *Id.* at 334-35, 109 S. Ct. at 2955, 106 L. Ed. 2d at 288-89.

Justices Brennan and Marshall dissented on this point, finding sufficient basis to support a categorical bar. Justice Brennan wrote that in order to be classified as intellectually disabled, an individual must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior [which manifest] during the developmental period." *Id.* at 344, 109 S. Ct. at 2960, 106 L. Ed. 2d at 295 (Brennan, J., concurring in part and dissenting in part) (quoting Am. Ass'n on Mental Retardation, *Classification in Mental Retardation* 11 (H. Grossman ed. 1983)). As a result, Justice Brennan saw no need for individualized determination as members of the class necessarily lack a degree of culpability. *Id.* at 347-48, 109 S. Ct. at 2962, 106 L. Ed. 2d at 297. Justice Brennan further doubted that the individualized consideration afforded at sentencing will ensure that only exceptional intellectually disabled individuals with near normal capabilities will be picked to receive the death penalty. *Id.* at 346, 109 S. Ct. at 2961, 106 L. Ed. 2d at 296. In particular, Justice Brennan feared that the heinousness of the crime would overpower any mitigation effect of

intellectual disability. *Id.* at 347, 109 S. Ct. at 2962, 106 L. Ed. 2d at 296–97. Further, Justice Brennan feared that a prosecutor could argue that an intellectually disabled offender should be more severely punished than an ordinary defender. *Id.* Because the death penalty for intellectually disabled individuals, who lack the same degree of culpability as nondisabled adult offenders, did not advance the penal goals of deterrence and retribution, Justice Brennan concluded that the death penalty should be categorically barred for such offenders. *Id.* at 348–49, 109 S. Ct. at 2962–63, 106 L. Ed. 2d at 297–98.

Justice Stevens filed a short concurring and dissenting opinion. He concluded, based upon the medical facts, that executions of the intellectually disabled are unconstitutional notwithstanding Justice O'Connor's analysis of objective indicators showing a lack of national consensus. *Id.* at 350, 109 S. Ct. at 2963, 106 L. Ed. 2d at 298–99 (Stevens, J., concurring in part and dissenting in part).

The Supreme Court decided *Sanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989) (plurality opinion), *abrogated by Roper*, 543 U.S. at 574, 125 S. Ct. at 1198, 161 L. Ed. 2d at 25, on the same day it decided *Penry*. In *Sanford*, the Court considered the imposition of the death penalty on two youths aged sixteen and seventeen respectively. *Id.* at 364–65, 109 S. Ct. at 2972, 106 L. Ed. 2d at 315. Justice Scalia delivered the opinion for the Court. Justice Scalia found that a majority of jurisdictions whose laws allowed capital punishment still permitted execution of sixteen and seventeen year olds and that, as a result, the offenders had not demonstrated a national consensus against the death penalty. *Id.* at 372–73, 109 S. Ct. at 2976–77, 106 L. Ed. 2d at 320. While noting that the death penalty in fact was rarely imposed upon juveniles, Justice Scalia regarded it as

“overwhelmingly probable” that this was a result of prosecutors and juries exercising discretion to ensure that the death penalty is rarely imposed upon juvenile defendants. *Id.* at 374, 109 S. Ct. at 2977, 106 L. Ed. 2d at 321.

Speaking for four members of the Court, Justice Scalia went on to indicate that the fact that youth were treated differently for purposes of driving, drinking alcohol, and voting had no impact on the constitutional analysis. *Id.* at 374–75, 109 S. Ct. at 2977–78, 106 L. Ed. 2d at 321. He also wrote that in determining a national consensus, the only relevant materials were legislative action; public opinion polls, views of interest groups, and positions adopted by various professional associations were irrelevant. *Id.* at 377, 109 S. Ct. at 2979, 106 L. Ed. 2d at 323.

On balance, *Eddings*, *Thompson*, *Penry*, and *Sanford* demonstrate that the Supreme Court in the immediate aftermath of *Furman* was repeatedly sharply divided on issues related to the imposition of capital punishment. In the aggregate, however, the majority of the Supreme Court usually elected a demanding process with particularized showings of culpability of the individual defendant over categorical rules that would exclude certain types of defendants from receiving the death penalty. On the other hand, the Court was receptive to categorical rules relating to the type of offenses for which the death penalty might be imposed.

These cases, however, were often decided by narrow majorities or plurality opinions with majorities shifting depending upon the peculiar facts of the case. The cases reflect difficult decision-making when the Supreme Court was called upon to decide whether to adopt a “bright line” categorical approach or a “case by case” process that depended upon the provision of adequate information and an appropriate structure

to ensure that the fact finder reserved the death penalty for only truly culpable defendants.

4. *Supreme Court caselaw revisits the death penalty and explores life in prison for juveniles and vulnerable classes.* Since 2000, however, the United States Supreme Court has reconsidered the implications, under the Cruel and Unusual Punishment Clause, of the death penalty and life without the possibility of parole for juveniles or vulnerable classes in a number of cases. As will be seen below, these cases significantly departed from past precedent and embarked on a new analysis of cruel and unusual punishment issues in the context of vulnerable classes, particularly juveniles.

The first case signaling the shift is *Atkins*. In *Atkins*, the Supreme Court revisited the question of whether intellectually disabled persons may be sentenced to death. 536 U.S. at 306–07, 122 S. Ct. at 2242, 153 L. Ed. 2d at 341. The Supreme Court had considered the same issue only thirteen years before in *Penry*, 492 U.S. at 302, 109 S. Ct. at 2934, 106 L. Ed. 2d at 256.

In *Atkins*, however, the Supreme Court reversed course, overruled *Penry*, and held that imposition of the death penalty on intellectually disabled persons violated the Eighth Amendment. *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350. In an opinion written by Justice Stevens, the Court in *Atkins* emphasized that “the American public, legislators, scholars, and judges” had deliberated over the question of the death penalty for the intellectually disabled and had come to a consensus that it should be prohibited. *Id.* at 307, 316, 122 S. Ct. at 2244, 2249, 153 L. Ed. 2d at 341, 347. Justice Stevens noted that while a number of states still imposed the death penalty on intellectually disabled individuals convicted of heinous crimes, the

consistency of the direction of change is more important than simply tallying the number. *Id.* at 315, 122 S. Ct. at 2249, 153 L. Ed. 2d at 346–47. Justice Stevens noted further that the practice of executing the intellectually disabled was “uncommon.” *Id.* at 316, 122 S. Ct. at 2249, 153 L. Ed. 2d at 347. In any event, Justice Stevens emphasized that objective evidence of consensus, though important, did not “wholly determine” the controversy as the Court was required to bring its own judgment to bear by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators. *Id.* at 312–13, 122 S. Ct. at 2247–48, 153 L. Ed. 2d at 345.

Justice Stevens wrote that for the intellectually disabled, the case for retribution was diminished. *Id.* at 319, 122 S. Ct. at 2251, 153 L. Ed. 2d at 349. Further, deterrence is also undermined by the diminished ability of the intellectually disabled “to understand and process information, to learn from experience, to engage in logical reasoning, [and] to control impulses.” *Id.* at 320, 122 S. Ct. at 2251, 153 L. Ed. 2d at 349.

Justice Stevens also noted that if left to case-by-case determinations, there was “[t]he risk ‘that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty.’” *Id.* at 320, 122 S. Ct. at 2251, 153 L. Ed. 2d at 350 (quoting *Lockett*, 438 U.S. at 605, 98 S. Ct. at 2965, 57 L. Ed. 2d at 990). Justice Stevens further noted that intellectually disabled defendants might be less able to assist in their defense, thereby undermining the accuracy of the fact-finding process that would lead to the imposition of the death penalty. *Id.* at 320–21, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350.

The tea leaves in *Atkins* did not go unnoticed. A few years later in *Roper*, the Supreme Court departed from its narrow approach in *Eddings*

and *Thompson* and held the death penalty unconstitutional as applied to juveniles in all cases “no matter how heinous the crime.” *Roper*, 543 U.S. at 568, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21.

In *Roper*, the Supreme Court cited several factors supporting its conclusion that juveniles are categorically different for purposes of imposing capital punishment. *Id.* at 569–70, 125 S. Ct. at 1195–96, 161 L. Ed. 2d at 21–22. First, the *Roper* Court noted that juveniles have a “lack of maturity and an underdeveloped sense of responsibility.” *Id.* at 569, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668, 125 L. Ed. 2d 290, 306 (1993)). Second, the *Roper* Court emphasized juveniles are more susceptible than adults to “negative influences and outside pressures” and juveniles “have less control, or less experience with control, over their own environment.” *Id.* at 569, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22. Third, the *Roper* Court noted juvenile personality and character traits are still being formed. *Id.* at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22.

In light of the differences between adults and juveniles, the *Roper* Court held that juveniles categorically cannot suffer the death penalty “no matter how heinous the crime.” *Id.* at 568, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21. The *Roper* Court stressed that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

Five years after *Roper*, the Supreme Court decided *Graham*. In *Graham*, the Supreme Court considered the constitutionality of life in prison without parole for juvenile offenders who commit nonhomicide

offenses. 560 U.S. at 52–53, 130 S. Ct. at 2017–18, 176 L. Ed. 2d at 832. In *Graham*, the state in effect sought to uphold the life-without-the-possibility-of-parole sentence on the ground that *Roper* was a death-penalty case and “death is different” for purposes of constitutional analysis. See *id.* at 69, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842.

As in *Roper*, however, the *Graham* Court developed a categorical rule, namely, that when nonhomicide offenses are involved, juveniles may not be sentenced to life without the possibility of parole regardless of the nature of the underlying crimes. *Id.* at 82, 130 S. Ct. at 2034, 176 L. Ed. 2d at 850. The *Graham* Court cited the reasoning of *Roper* and prior precedents, noting that because of the lack of maturity, a juvenile offense “is not as morally reprehensible as that of an adult.” *Id.* at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841 (quoting *Thompson*, 487 U.S. at 835, 108 S. Ct. at 2699, 101 L. Ed. 2d at 719). Reasoning that the principles articulated in *Roper* applied fully in the context of juvenile nonhomicide offenses, the *Graham* Court categorically declared that life without the possibility of parole could never be applied to such offenses, regardless of their nature or heinousness. *Id.* at 68, 82, 130 S. Ct. at 2026, 2034, 176 L. Ed. 2d at 841, 850. As in *Roper*, the *Graham* Court doubted “that courts taking a case-by-case . . . approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” *Id.* at 77, 130 S. Ct. at 2032, 176 L. Ed. 2d at 847.

The result in *Graham* was consistent with the position advanced by the American Medical Association (AMA) in an amicus brief with extensive citations to scientific and medical authorities. Brief for Am. Med. Ass’n et al. as Amici Curiae Supporting Neither Party, *Graham*, 560 U.S. at 48, 130 S. Ct. at 2011, 176 L. Ed. 2d at 825 (No. 08–7412, 08–

7621), 2009 WL 2247127. The AMA noted that “[s]cientists have found that adolescents as a group, even in the later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior.” *Id.* at *2. The AMA asserted that modern science demonstrated that “the structural and functional immaturities of the adolescent brain provide a biological basis for the behavioral immaturities exhibited by adolescence” and that “adolescent brains are structurally immature in areas of the brain associated with enhanced abilities of executive behavioral control.” *Id.* at *4, 16.

The third case in the quartet of recent juvenile cases is *Miller*. In *Miller*, the Supreme Court considered two heinous murder cases involving juvenile defendants. 567 U.S. at ___, 132 S. Ct. at 2461–62, 183 L. Ed. 2d at 415–17. The defendants, and various amici including the ABA and the American Psychology Association (APA), urged the court to adopt the categorical approach of *Roper* and *Graham*. See ABA Brief, 2012 WL 166269; APA Brief, 2012 WL 174239.

The ABA noted that it had long been interested in matters affecting juvenile justice. ABA Brief at *2. As far back as 1980, the ABA had concluded that when compared to adults, the reduced capacity of juveniles—“in moral judgment, self-restraint and the ability to resist the influence of others, among other factors—rendered [juveniles] less morally culpable than adults.” *Id.* at *7. Citing the principles enunciated by the Supreme Court in *Roper* and *Graham*, the ABA urged that the Court adopt a categorical rule barring life in prison without parole for juveniles. *Id.* at *6–7.

The ABA added two additional observations based “on its study, research and experience of its members.” *Id.* at *13. First, the ABA stressed that “juveniles are less capable than adults of communicating

with and giving meaningful assistance to their counsel.” *Id.* Second, the ABA observed that “juveniles convicted of murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders.” *Id.* In conclusion, the ABA stressed that it was not asserting that all juveniles should be entitled to parole, but only that they should not be denied the opportunity to be considered for parole before they die in prison. *Id.* at *23.

The brief of the APA addressed the inability of professionals to predict the course of juvenile development. APA Brief at *21. The APA brief bluntly stated that “[t]he positive predictive power of juvenile psychotherapy assessments . . . remains poor.” *Id.* The APA cited a research study that found only sixteen percent of the young adolescents who scored in the top fifth on a juvenile psychopathy measurement tool would eventually be assessed as psychopathic at age twenty-four. *Id.* Another study that attempted to use psychological testing to predict future homicide offenders yielded a very high false positive rate of eighty-seven percent. *Id.* at *22. According to the APA, “those who have dedicated their careers to identifying risk factors associated with persistent criminality” acknowledge the “very imperfect predictions of which offense trajectory individuals will follow over time” and warn against the “danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions.” *Id.* (quoting Rolf Loeber et al., *Violence and Serious Theft: Development and Prediction from Childhood to Adulthood* 333 (2008)).

Yet, the Supreme Court in *Miller* stopped short of a categorical rule. See *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (“Although we do not foreclose a sentencer’s ability to make [a life-without-the-possibility-of-parole] judgment in homicide cases, we require

it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”). In *Miller*, the Supreme Court recognized the applicability of *Roper-Graham* principles to juvenile homicide offenders, noting that the differences between children and adults “diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Id.* at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419. The *Miller* Court, like the Court in *Graham* and *Roper*, recognized the difficulty in distinguishing “between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” *Id.* at ___, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1183, 161 L. Ed. 2d at 24).

Yet, the *Miller* Court did not reach the question of whether a categorical ban was required. *Id.* Instead, the Court reserved judgment on the categorical approach, noting ambiguously that “appropriate occasions,” possibly including parole hearings and posttrial proceedings, “for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.*

Finally, the Supreme Court recently has provided further illumination of the contours of its cruel and unusual punishment jurisprudence in *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 718, 193 L. Ed. 2d at 599. In *Montgomery*, the Court considered whether the decision in *Miller* applied retroactively to cases on collateral review. *Id.* at ___, 136 S. Ct. at 725, 193 L. Ed. 2d at 610. The Court concluded that its holding in *Miller* should be given retroactive effect because *Miller* announced a substantive rule of law excluding a category of punishment from a class of offenders. *Id.* at ___, 136 S. Ct. at 736, 193 L. Ed. 2d at

622. The *Montgomery* Court stressed that *Miller* barred life in prison without the possibility of parole for “all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Id.* at ___, 136 S. Ct. at 734, 193 L. Ed. 2d at 620. The Court emphasized that *Miller* applied retroactively because it was based upon the risk that “the vast majority of juvenile offenders” face a punishment that the law cannot impose upon them, namely, life without possibility of parole. *Id.* at ___, 136 S. Ct. at 734, 193 L. Ed. 2d at 620.

The Court noted that giving retroactive effect to *Miller* did not require states to relitigate sentences “in every case where a juvenile offender received mandatory life without parole.” *Id.* at ___, 136 S. Ct. at 736, 193 L. Ed. 2d at 622. Citing a Wyoming statute, the Court emphasized that a state may remedy *Miller* violations by permitting juvenile offenders to be considered for parole. *Id.* Allowing offenders to be considered for parole “ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” *Id.* The Court held that extending parole eligibility to juvenile offenders does not impose an onerous burden on the states. *Id.* Those persons who show an “inability to reform will continue to serve life sentences.” *Id.* But, the Court emphasized, under a life-with-parole approach “[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.” *Id.*

5. *Summary of principles of United States Supreme Court cases involving juveniles facing death or life in prison.* As is apparent, the United States Supreme Court’s approach to the Eighth Amendment has evolved substantially in recent years. The Supreme Court’s current

approach to the Eighth Amendment's Cruel and Unusual Punishment Clause in the context of juvenile offenders may be summarized as follows:

i. Juveniles are constitutionally different than adults for purposes of sentencing. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418; *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841; *Roper*, 543 U.S. at 569–71, 125 S. Ct. at 1195–96, 161 L. Ed. 2d at 21–22.

ii. Because of these differences, ordinary criminal culpability is diminished when the offender is a youth, and the penological objectives behind harsh sentences are diminished. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419; *Graham*, 560 U.S. at 74, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845; *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196, 161 L. Ed. 2d at 22; *cf. Atkins*, 536 U.S. at 316, 122 S. Ct. at 2250, 153 L. Ed. 2d at 348.

iii. The traits of youth that diminish ordinary criminal culpability are not crime specific and are present even in juveniles who commit heinous crimes. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 735–36, 193 L. Ed. 2d at 621–22; *Miller*, 567 U.S. at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420.

iv. Imposition of life in prison without parole shares some of the characteristics with death sentences that are shared by no other sentences. Life without the possibility of parole is “a forfeiture that is irrevocable,” depriving the convict of the most basic liberties without hope of restoration except in the remote possibility of executive clemency. Life in prison is especially harsh for juveniles, who will almost inevitably serve more years and a greater percentage of life in prison than adult offenders. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2466, 183 L. Ed. 2d at

421; *Graham*, 560 U.S. at 69–70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842.

v. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen, but society has generally drawn the line at eighteen for the purposes of distinguishing juveniles from adults. *Graham*, 560 U.S. at 74–75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845; *Roper*, 543 U.S. at 574, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

vi. Because the signature qualities of youth are transient, incorrigibility is inconsistent with youth. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419; *Graham*, 560 U.S. at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844; *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22.

vii. While juveniles who prove irredeemably corrupt may be subject to life in prison, “appropriate occasions” for sentencing juveniles to this harshest possible penalty will be “uncommon” or “rare.” *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 733–34, 193 L. Ed. 2d at 619; *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424.

viii. Even trained and experienced professionals find it very difficult to predict which youthful offenders might ultimately fit into this small group of incorrigible offenders. *Graham*, 560 U.S. at 72–73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844; *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

ix. An unacceptable likelihood exists that the brutality or cold-blooded nature of a particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence. *Graham*, 560 U.S. at

77–78, 130 S. Ct. at 2032, 176 L. Ed. 2d at 847; *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

x. Juveniles are less able to provide meaningful assistance to their lawyers than adults, a factor that can impact the development of the defense and gives rise to a risk of erroneous conclusions regarding juvenile culpability. *Graham*, 560 U.S. at 78, 130 S. Ct. at 2032, 176 L. Ed. 2d at 847–48; cf. *Atkins*, 536 U.S. at 320, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350.

xi. Because of the transient characteristics of youth that diminish criminal culpability, life-without-the-possibility-of-parole sentences “pose[] too great a risk” of disproportionate punishment. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424.

xii. Accurate assessment of whether a youth is incorrigible is particularly important when a sentence of life in prison is involved, because such sentences share some of the characteristics of death sentences—characteristics that are shared by no other sentences. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2466–67, 183 L. Ed. 2d at 421–22; *Graham*, 560 U.S. at 69–70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842.

xiii. Even if the state’s judgment that a juvenile offender is incorrigible is later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. *Graham*, 560 U.S. at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844–45.

xiv. Even if life in prison without the possibility of parole at the time of sentence is no longer available, nothing guarantees that a juvenile offender will be entitled to release. *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845–46.

C. Iowa Supreme Court Precedents.

1. *Relationship between state and federal law.* We, of course, follow the decisions of the United States Supreme Court interpreting the Federal Constitution, and they are binding upon us on questions of federal law. Thus, in Iowa, the United States Constitution as interpreted by the Supreme Court prevents the state from imposing life without the possibility of parole in most homicide cases involving juveniles. If life without the possibility of parole may be imposed at all under federal law, which is unclear at this point, it may be imposed only in cases where irretrievable corruption has been demonstrated by the “rarest” of juvenile offenders. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734, 193 L. Ed. 2d at 620.

In any event, the rulings of the United States Supreme Court create a floor, but not a ceiling, when we are called upon to interpret parallel provisions of the Iowa Constitution. In interpreting provisions of the Iowa Constitution, we may find federal authority persuasive, but it is certainly not binding. In the development of our own state constitutional analysis, we may look to decisions of the United States Supreme Court, dissenting opinions of the Supreme Court, cases from other states, and other persuasive authorities. *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014); *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010).

2. *Recent Iowa caselaw utilizing Roper–Graham–Miller principles.* We now turn to Iowa cases in which we considered the application of *Roper–Graham–Miller* reasoning under article I, section 17 of the Iowa Constitution.⁵ See *Seats*, 865 N.W.2d at 553–57; *Lyle*, 854 N.W.2d at

⁵The Iowa Constitution provides, “Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.” Iowa Const. art. I, § 17. The Eighth Amendment to the United States Constitution

384–86; *Ragland*, 836 N.W.2d at 113–17; *Pearson*, 836 N.W.2d at 95–97; *Null*, 836 N.W.2d at 50–51, 60–66. In these cases, we primarily embraced the reasoning in the United States Supreme Court’s trilogy under the Iowa Constitution but also built upon it and extended its principles. See *Seats*, 865 N.W.2d at 553–57; *Lyle*, 854 N.W.2d at 383–84; *Ragland*, 836 N.W.2d at 113–17; *Pearson*, 836 N.W.2d at 95–98; *Null*, 836 N.W.2d at 70.

Our Iowa constitutional cases elaborate on the *Roper–Graham–Miller* trilogy in several important ways. We emphasized in *Pearson* and *Null* that immaturity, impetuosity, and poor risk assessment are to be treated as mitigating, not aggravating factors, in sentencing. *Pearson*, 836 N.W.2d at 97; *Null*, 836 N.W.2d at 75. In *Ragland*, *Pearson*, and *Null*, we extended the reasoning of the *Roper–Graham–Miller* trilogy to require individualized hearings in cases involving long prison sentences for juvenile defendants short of life in prison without the possibility of parole. *Ragland*, 836 N.W.2d at 122; *Pearson*, 836 N.W.2d at 97; *Null*, 836 N.W.2d at 76–77. In *Lyle*, we noted that death is no longer irreconcilably different for juveniles and extended the requirement of an individualized hearing when sentencing juveniles for lesser crimes for which the legislature has prescribed mandatory adult sentences. 854 N.W.2d at 396–98; see also *Bruegger*, 773 N.W.2d at 883–84 (applying *Roper* concepts outside the death-penalty context).

Last term we decided *Seats*. In *Seats*, we reviewed the developing jurisprudence regarding life sentences for juvenile homicide offenders. 865 N.W.2d at 553–57. As in *Miller* and our prior cases, we reserved the

provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

question of whether life sentences without the possibility of parole should be categorically barred. *Id.* at 558. Instead, we noted that if a life sentence without parole could ever be imposed on a juvenile offender, the burden was on the state to show that an individual offender manifested “irreparable corruption.” *Id.* at 556 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424). In making such a determination, we noted that findings of such irreparable corruption should be “rare and uncommon.” *Id.* at 555. We thus concluded the presumption for any sentencing judge is that a juvenile should be sentenced to life with the possibility of parole even for homicide offenses. *Id.* In considering whether the state had overcome the presumption, we observed that the district court was required to recognize that “children are constitutionally different from adults.” *Id.* at 556 (quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418). Specifically, the district court must consider “the family and home environment that surrounds” the juvenile, including “childhood abuse, parental neglect, personal and family drug or alcohol abuse, prior exposure to violence, lack of parental supervision, lack of an adequate education, and the juvenile’s susceptibility to psychological or emotional damage.” *Id.* (first quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423).

In addition, the district court must consider the nature of the offense “including the extent of [the juvenile’s] participation in the conduct and the way the familial and peer pressures may have affected [the juvenile],” and whether “substance abuse played a role in the juvenile’s commission of the crime.” *Id.* (first quoting *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423). Finally, we stressed the district court must recognize that “[j]uveniles are more capable of change than are adults’ and that as a result, ‘their actions are less likely

to be evidence of “irretrievably depraved character.” ’ ’ *Id.* (quoting *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841). We cited *Null* for the proposition that because “incorrigibility is inconsistent with youth, care should be taken to avoid irrevocable judgment about [an offender’s] place in society.” *Id.* (quoting *Null*, 836 N.W.2d at 75).

3. *Summary of Iowa cases applying Roper–Graham–Miller principles.* Based on our recent cases, we distill the following principles:

i. We have generally accepted the principles enunciated by the United States Supreme Court in the *Roper–Graham–Miller* trilogy in our interpretation of article I, section 17 of the Iowa Constitution. *See Seats*, 865 N.W.2d at 555–57; *Null*, 836 N.W.2d at 70–76.

ii. We have regarded the constitutional holding in *Miller* as applied by this court under article I, section 17 as broadly substantive and not narrowly procedural, a view subsequently adopted by the United States Supreme Court under the Eighth Amendment in *Montgomery*. *See State v. Louisell*, 865 N.W.2d 590, 594 (Iowa 2015); *Ragland*, 836 N.W.2d at 114–16.

iii. Using our independent judgment under article I, section 17, we have applied the principles of the *Roper–Graham–Miller* trilogy outside the narrow factual confines of those cases, including cases involving de facto life sentences, very long sentences, and relatively short sentences. *See Lyle*, 854 N.W.2d at 402–03; *Ragland*, 836 N.W.2d at 122; *Null*, 836 N.W.2d at 71–72.

D. Application.

1. *Categorical rules vs. case-by-case basis.* Sweet asks us to adopt a categorical rule, namely, that juvenile offenders may never be sentenced to life without the possibility of parole. *See Graham*, 560 U.S. at 77, 139 S. Ct. 2032, 176 L. Ed. 2d at 847 (doubting “that courts

taking a case-by-case . . . approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change”); *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24 (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”). In our earlier cases, however, we found it unnecessary to address this larger proposition. See *Seats*, 865 N.W.2d at 558; *Ragland*, 836 N.W.2d at 122; *Null*, 836 N.W.2d at 76.

We could continue to opt for the narrower, more incremental approach, by simply addressing the question of whether the State proved in this case that Sweet is one of the “extremely rare” juveniles who is “irredeemably corrupt.” Such a minimalist approach would allow for the development of additional caselaw before the larger categorical issue is confronted. Based on our experience and the caselaw developments, we think there is little to be gained by allowing further caselaw development on the question of whether a juvenile may ever receive a sentence of life without the possibility of parole.

The Supreme Court in *Roper* and its progeny has declared that for juvenile offenders the opportunity for parole can be denied, if at all, only to “irretrievably depraved”⁶ or irreparably corrupt juvenile offenders. See *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22. The Court further narrowed the window of potential situations involving life in prison without the possibility of parole in *Montgomery*, 577 U.S. at ___,

⁶The phrase “irretrievably depraved” debuted in *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22, and reappeared in *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841.

136 S. Ct. at 736, 193 L. Ed.2d at 622. In light of *Miller*, as elaborated by *Montgomery*, the United States Constitution allows life without the possibility of parole for juveniles, if at all, only in “the rarest” of cases. *Id.* at ___, 136 S. Ct. at 726, 193 L. Ed. 2d at 726. Thus, the United States Supreme Court, under the Federal Constitution, has preserved life without the possibility of parole for juveniles, even those who commit heinous crime, only for a very small category of cases. And, the suggestion in *Montgomery* that the states could avoid constitutional questions by adopting statutes that do not impose life without the possibility of parole for juvenile offenders indicates that this narrow exception may be rapidly closing under federal law. *See id.* at ___, 136 S. Ct. at 736, 193 L. Ed. 2d at 622.

So, the Supreme Court has already established that except in very rare cases, life without the possibility of parole is not available under the Federal Constitution even for heinous crimes committed by juvenile offenders. The only marginal issue remaining under the Iowa Constitution is whether we should continue to reserve the possibility that a juvenile offender may be identified as “irretrievable” at the time of sentencing, or whether that determination must be made by the parole board at a later time after the offender’s juvenile brain has been fully developed and a behavior pattern established by a substantial period of incarceration. If the death-penalty jurisprudence developed after *Furman* has any application to cases involving life in prison without parole, the process for making the determination of which offenders are most culpable would be resource intensive, require expert testimony, and would not be a matter left to the unguided discretion of the sentencer.

2. *Consideration of categorical approach.* In considering whether to adopt a categorical approach to the class of offenders or offenses

under the cruel and unusual punishment clause of the Iowa Constitution, we have referred to the two-step process found in the cases of the United States Supreme Court. Applying this test, we look to whether there is a consensus, or at least an emerging consensus, to guide the court's consideration of the question. Second, we exercise our independent judgment to determine whether to follow a categorical approach. *Lyle*, 854 N.W.2d at 386.

In considering the question of consensus, we note the United States Supreme Court has emphasized that its decisions impose a nationwide standard on all the states and that its decisions limit the range of options available for states in a federalist system. In considering its cruel and unusual punishment jurisprudence, the Court has emphasized this federalism consideration. *See Gregg*, 428 U.S. at 186–87, 96 S. Ct. at 2931, 49 L. Ed. 2d at 882. For us, however, these federalism concerns are entirely absent.

In any event, there is an argument that a consensus does, in fact, exist even under the standards of the United States Supreme Court. For example, an amicus brief in *Montgomery* noted that after *Miller* was decided, nine states have abolished life-without-the-possibility-of-parole sentences for juveniles, thereby establishing a clear direction toward abolition of the life-in-prison death penalty for juveniles. Brief for Charles Hamilton Houston Inst. for Race & Justice & Criminal Justice Inst. as Amici Curiae Supporting Neither Party, *Montgomery*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (No. 14–280), 2015 WL 4624172, at *4–5 [hereinafter Charles Hamilton Houston Brief]. Further, many of the states that do allow life in prison for juveniles do so only through statutes that allow the transfer of juveniles to adult court. *See Graham*, 560 U.S. at 67, 130 S. Ct. at 2025–26, 176 L. Ed. 2d at 840–41. The

amicus brief noted that since *Miller*, the number of juveniles actually sentenced to life without the possibility of parole has dramatically decreased—describing thirteen additional states as having functionally barred the practice. Charles Hamilton Houston Brief, at *7–10.

In addition, various professional groups urge that we categorically bar life-in-prison-without-parole sentences for juveniles. The Supreme Court has recognized the role of such groups in evaluating cruel and unusual punishment claims. See *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026–27, 176 L. Ed. 2d at 841–42; *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24. Finally, as noted by the ABA in its amicus brief for *Miller*, the United States is the only country in the world to impose life in prison without the possibility of parole on its juvenile offenders. ABA Brief at *24.

Yet, many states have sanctioned life in prison without parole for juvenile murder offenders. And, while one post-*Miller* state supreme court categorically barred life in prison without possibility of parole for juveniles under its state constitution, *Diatchenko v. District Attorney*, 1 N.E.3d 270, 276 (Mass. 2013), several other state supreme courts, over strong dissents, have come to the opposite conclusion. See, e.g., *Bun v. State*, 769 S.E.2d 381, 383–84 (Ga. 2015), *disapproved on other grounds by Veal v. State*, ___ S.E.2d ___, ___, 2016 WL 1085360, at *9 (Ga. Mar. 21, 2016); *Conley v. State*, 972 N.E.2d 864, 879–80 (Ind. 2012); *State v. Houston*, 353 P.3d 55, 76–77 (Utah 2015).

All this gives us pause. Yet, while we regard evidence of consensus on the general proposition that “youth are different” is not subject to dispute, we do not find a consensus today on the very narrow question before us: whether the small number of juvenile offenders convicted of murder may be sentenced *at time of trial* to life in prison without the

possibility of parole or whether such a determination must be made *at a later date* by a parole board.

The fact that we have not found a consensus, however, does not end the inquiry. Although examination of statutes, sentencing practices, professional opinion, and other sources may inform our analysis, in the end we must make an independent judgment. *See, e.g., Graham*, 560 U.S. at 61, 130 S. Ct. at 2022, 176 L. Ed. 2d at 837 (“[T]he Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.”); *Kennedy*, 554 U.S. at 421, 128 S. Ct. at 2650, 171 L. Ed. 2d at 539–40 (“Consensus is not dispositive” but the outcome “depends on the standards elaborated by controlling precedents, and on the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”); *Roper*, 543 U.S. at 564, 125 S. Ct. at 1192, 161 L. Ed. 2d at 18 (“We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”); *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350 (independently evaluating whether death is a suitable punishment for an intellectually disabled criminal). In *Miller*, for instance, the Supreme Court did not believe a demonstration of community consensus was necessary but simply demonstrated that there was no consensus contrary to the result advanced by the Court. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2471–73, 183 L. Ed. 2d at 425–29.

We find our approach in *Lyle* instructive. In that case, we made it clear that the existence or nonexistence of a consensus did not relieve this court of its duty to exercise independent judgment. *Lyle*, 854 N.W.2d at 387. In *Lyle*, we extended application of the *Roper–Graham–*

Miller principles to mandatory minimum adult prison terms imposed on juveniles. *Id.* at 402.

In reviewing the caselaw development, we believe, in the exercise of our independent judgment, that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. We agree with the observation in *Graham* that the sentencing task is undertaken by trial judges “who seek with diligence and professionalism to take into account the human existence of the offender and the just demands of a wronged society.” *Graham*, 560 U.S. at 77, 130 S. Ct. at 2031, 176 L. Ed. 2d at 847. But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is “irretrievably corrupt” at a time when even trained professionals with years of clinical experience would not attempt to make such a determination.

No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem. As can be seen in the caselaw, the United States Supreme Court has struggled between categorical and case-by-case approaches involving the death-penalty and life-without-the-possibility-of-parole sentences. Generally, a case-by-case approach is only permitted in death-penalty cases when the sentencer has adequate information and the risk of an arbitrary application is minimized by substantive and procedural standards. But here, in imposing a sanction akin to the death penalty in

some respects, the trial court simply will not have adequate information and the risk of error is unacceptably high, even if we were to require an intensive, highly structured inquiry similar to that required by the ABA guidelines for the defense of death-penalty cases.

The Court's reasoning in *Roper*, foreshadowed the fallacy of the predictive enterprise later narrowly reserved in *Miller*. In *Roper*, the Court concluded the death penalty is cruel and unusual for juvenile offenders under the Eighth Amendment—without regard to the heinousness of their crimes—because an emerging consensus in neuroscience has revealed the human brain is not fully developed until the early to mid-twenties. *Roper*, 543 U.S. at 568–74, 125 S. Ct. at 1194–98, 161 L. Ed. 2d at 21–25; see also Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 71 (2014) [hereinafter Steinberg] (suggesting the brain's prefrontal cortex and the limbic system become more interconnected during the third and final phase of brain development). In the third and final phase of brain development extending into the early twenties, humans “get better at controlling their impulses, thinking about the long-term consequences of their decisions, and resisting peer pressure.” Steinberg at 71. This phenomenon of brain development explains why adolescents can demonstrate intellectual promise⁷ and utilize a robust vocabulary while lacking sound judgment and exhibiting poor self-regulation. Put another

⁷The sentencing court observed that Sweet recited his rights during an interrogation and showed signs of average to above average intelligence. The ability to recite one's rights, however, does not necessarily establish one's mature understanding of them or demonstrate maturity of judgment. Steinberg provides a reminder of this distinction by rhetorically asking, “If adolescents are so smart, why do they do such stupid things?” Steinberg at 69. The answer, Steinberg tells us, “has to do with how their brains develop.” *Id.*

way, the timeline of brain development explains why smart adolescents sometimes do really stupid things. *Id.* at 69.

While not without some value, we think the fact that an offender is approaching the age of eighteen is not a very helpful factor in determining who fits the narrow group of irretrievably depraved defenders. We have noted that “the fact . . . a defendant is nearing the age of eighteen does not undermine the teachings of *Miller*.” *Seats*, 865 N.W.2d at 557. The features of youth identified in *Roper* and *Graham* simply do not magically disappear at age seventeen—or eighteen for that matter. See Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 60 (2008) (“[S]ubstantial psychological maturation takes place in middle and late adolescence and even into early adulthood.”); see also *Null*, 836 N.W.2d at 55 (“[T]he human brain continues to mature into the early twenties.”). While older teenagers may show greater intellectual development, that is not the same as the maturity of judgment necessary for imposing adult culpability. As Steinberg asks rhetorically, “If adolescents are so smart, why do they do such stupid things?” Steinberg at 69. We thus do not find chronological age is a reliable factor that can be applied by the district court to identify those uncommon juveniles that may merit life without the possibility of parole.

Another factor suggested in *Miller*—the offender’s family and home environment—is also fraught with risks. For example, what significance should a sentencing court attach to a juvenile offender’s stable home environment? Would the fact that the adolescent offender failed to benefit from a comparatively positive home environment suggest he or she is irreparable and an unlikely candidate for rehabilitation? Or conversely, would the offender’s experience with a stable home environment suggest that his or her character and personality have not

been irreparably damaged and prospects for rehabilitation are therefore greater? See *Seats*, 865 N.W.2d at 561-62 (Hecht, J., concurring specially) (suggesting a sentencing court cannot predict the answers to these extremely challenging questions with reasonable certainty).

A similar quandary faces courts sentencing juvenile offenders who have experienced horrendous abuse and neglect or otherwise have been deprived of a stable home environment. Should the offenders' resulting profound character deficits and deep-seated wounds count against the prospects for rehabilitation and in favor of life-without-the-possibility-of-parole sentences under the *Miller* framework? Or should sentencing courts view the deprivation of a stable home environment as a contraindication for life without the possibility of parole because only time will tell whether maturation will come with age and treatment in a structured environment? See *Louisell*, 865 N.W.2d at 592-95 (describing an inmate with a difficult and chaotic childhood who committed first-degree murder at age seventeen but made remarkable progress toward maturity and rehabilitation during twenty-six years in prison).

Social science suggests reliable answers to these questions come only with the benefit of time and completion of brain development. Why, then, should we empower sentencing courts to make final decisions on opportunities for parole before the juvenile offenders' prospects for rehabilitation are reliably known? There is, after all, plenty of time to make such determinations later for juvenile offenders like Sweet who are sentenced to life in prison for first-degree murder.

Because of the difficulty of applying the individual *Miller* factors, the likelihood that the multifactor test can be consistently applied by our district courts is doubtful at best. The APA in *Miller* in an amicus brief emphasized that professional psychologists could not predict who was

irretrievable. APA Brief at *21. We should not ask our district court judges to predict future prospects for maturation and rehabilitation when highly trained professionals say such predictions are impossible.

In sum, we conclude that sentencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision. The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available. See *Seats*, 865 N.W.2d at 557 ("Even if the judge sentences the juvenile to life in prison with parole, it does not mean the parole board will release the juvenile from prison."); see also *State v. Andrews*, 329 S.W.3d 369, 379 (Mo. 2010) (Wolff, J., dissenting) (noting an offender sentenced to life with parole may nonetheless "spend the rest of his life in prison if the parole board does not determine that he is suitable for parole release"). Steinberg has poignantly made this very point:

It's not only adolescents' immature judgment that demands that we treat them differently when they break the law. If the plasticity of the adolescent brain makes juveniles more amenable to rehabilitation, this argues against mandatory life sentences that don't allow courts to consider whether an impulsive or impressionable teenager might grow into a law-abiding adult who can control his impulses and stand up to peer pressure. Of course, a teenager who kills another person deliberately should be punished—no one is arguing otherwise. But should he be incarcerated for the rest of his life, with no chance to prove that he has matured?

Steinberg at 188. Thus, juvenile offenders' prospects for rehabilitation augur forcefully against speculative, up-front determinations of opportunities for parole and leads inexorably to the categorical

elimination of life-without-the-possibility-of-parole sentences for juvenile offenders.

For the above reasons, we adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under article I, section 17 of the Iowa Constitution. As a result, the sentence of the district court in this case is vacated and the matter remanded to the district court for resentencing.

Nothing in this opinion, of course, suggests that a juvenile offender is entitled to parole. The State is not required to make such a guarantee, and those who over time show irredeemable corruption will no doubt spend their lives in prison. The determination of irredeemable corruption, however, must be made when the information is available to make that determination and not at a time when the juvenile character is a work in progress.

IV. Conclusion.

For the above reasons, we conclude a sentence of life without the possibility of parole for a juvenile offender violates article I, section 17 of the Iowa Constitution. The sentence imposed by the district court is reversed, and the case is remanded for resentencing consistent with this opinion.

DISTRICT COURT SENTENCE REVERSED AND CASE REMANDED WITH INSTRUCTIONS.

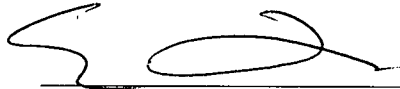
Cady, C.J., and Wiggins and Hecht, JJ., join this opinion. Cady, C.J., and Wiggins, J., file separate concurring opinions. Mansfield, J., files a dissenting opinion in which Waterman and Zager, JJ., join. Zager, J., files a separate dissenting opinion in which Waterman and Mansfield, JJ., join.

BY AP
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